

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Marshall Johnson
Ken Nickolai
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Application of the City of
Buffalo to Extend its Assigned Service Area
into the Area Presently Assigned to Wright-
Hennepin Cooperative Electric Association

ISSUE DATE: October 16, 2003

DOCKET NO. E-221, 148/SA-03-989

ORDER DENYING PETITION FOR
INTERIM SERVICE RIGHTS AND NOTICE
AND ORDER FOR HEARING

PROCEDURAL HISTORY

On July 1, 2003, the City of Buffalo (the City) filed a petition under Minn. Stat. § 216B.44 stating its intention to exercise its right to extend its assigned service area to include three recently annexed areas, identified as Martineau's Subdivision, Sundance Ridge, and Mill Creek Inn. All three areas lie within the assigned service area of Wright-Hennepin Cooperative Electric Association (Wright-Hennepin or the Cooperative). The petition asked the Commission to adjust the City's service area boundaries to include these areas and to open a contested case proceeding to determine appropriate compensation to the Cooperative for service rights to the areas.

The petition also asked the Commission to grant the City the right to serve new points of delivery within the annexed areas while compensation was being determined, subject to two conditions the Commission has imposed in other cases: (1) the City would escrow \$1,500 per acre as it extended service; and (2) in the event that service rights reverted to Wright-Hennepin, the City would forgo compensation for any cable it installed that did not meet federal standards applicable to rural electric cooperatives.

On August 1, 2003, Wright-Hennepin filed comments. Wright-Hennepin concurred in the request for a contested case proceeding to set compensation for service rights to the annexed areas, but opposed the City's request to serve new points of delivery within the annexed areas while compensation was being determined.

On August 1 and August 14, 2003, the Minnesota Department of Commerce (the Department) filed comments. The Department recommended that the Commission open a contested case proceeding to set compensation for the annexed areas and deny the City's petition for interim service rights.

Two other issues – an unpaid compensation award for service rights the City had acquired earlier and the annexation status of one of the three areas in the current petition – were addressed and resolved before the matter came before the Commission.

On September 4, 2003, the matter came before the Commission.

FINDINGS AND CONCLUSIONS

I. Commission Action on the Request to Determine Compensation for Service Rights to the Annexed Areas

It is clear as a matter of law that the City of Buffalo has the right to serve the annexed areas upon paying appropriate compensation to Wright-Hennepin. Minn. Stat. § 216B.44 authorizes municipal utilities to extend their assigned service areas within their city limits as long as they compensate the utilities they displace.

If the municipal utility and the displaced utility cannot agree on compensation, either party may ask the Commission to decide the issue, as the City has here. The Commission is to set compensation based on the original cost of affected utility property less depreciation, loss of revenue by the displaced utility, integration expenses, and other appropriate factors.

These factors require evidentiary development, and the Commission will therefore refer the compensation issue to the Office of Administrative Hearings for contested case proceedings. A Notice and Order for Hearing follows this Order's substantive discussion of the second issue, the City's request that it be permitted to serve new points of delivery within the annexed areas while compensation is being determined.

II. Commission Action on the Petition for Interim Service Rights

A. The Legal Standard

Under Minn. Stat. § 216B.44, a municipal utility may acquire the right to serve any area within its city limits upon payment of appropriate compensation.¹ The statute also provides that the

¹ Under the statute, a municipal utility may serve without paying compensation if the area at issue is not receiving service from the assigned utility. The Commission has interpreted the phrase "receiving service" to include situations in which the assigned utility has facilities in place capable of providing service. The areas at issue are receiving service within the meaning of the statute, since the Cooperative has facilities in place that are capable of serving them.

Commission may allow the municipal utility to serve new customers in areas they are acquiring if the Commission finds that new service extensions by the assigned utility would not be in the public interest, taking into account any unnecessary duplication of facilities. Otherwise, the assigned utility is to continue serving old and new customers until compensation has been determined and paid.

B. The City's Claims

The City claimed that permitting the City to serve new points of delivery during the compensation proceeding would serve the public interest in the following ways:

- (a) It would reduce the costs of integrating the two utilities' systems when the City acquired permanent service rights to the area.
- (b) It would reduce customer confusion and inconvenience when the City acquired permanent service rights to
- (c) It would reduce the duplication of facilities.

The City argued that since it was virtually certain that it would acquire service rights to the annexed areas, it would be more efficient and economical for the City to serve new points of delivery as soon as possible.

C. Positions of the Other Parties

The Cooperative opposed granting interim service rights to the City on three main grounds:

- (a) The Cooperative could readily serve the annexed areas with existing facilities, meaning there would be no unnecessary duplication of facilities.
- (b) The Cooperative's system and the City's system are highly compatible, meaning there would be minimal expense and inconvenience when service rights ultimately transfer to the City.
- (c) There is a significant possibility that the transfer will not occur, since compensation for the areas at issue will likely be significantly higher than amounts the City has paid for service rights to other annexations.

The Department of Commerce recommended rejecting the City's interim service request on grounds that it was not certain that the City would complete its purchase of service rights to the annexed areas. The Department noted that the City does not have an established policy and practice of serving everyone within its city limits and that the City chooses areas to serve based at least in part on financial considerations. This means the City could choose to reverse course on acquiring service rights to the annexed areas.

The Department also stated that Wright-Hennepin can serve the annexed areas with its existing facilities while compensation is being determined, resulting in no unnecessary duplication of facilities.

D. Commission Action

The Commission finds that the City has not demonstrated that it would contravene the public interest to permit Wright-Hennepin to continue to serve new points of delivery while compensation is being determined. Service rights will therefore remain with the assigned utility until compensation has been determined and paid.

None of the potential disadvantages of permitting Wright-Hennepin to serve new points of delivery rise to the level of contravening the public interest. The only factor the statute specifically requires the Commission to consider – the unnecessary duplication of facilities – weighs in favor of Wright-Hennepin, which already has in place a three-phase line amply capable of delivering service to the areas. Neither do the other factors cited by the City establish that the public interest would be ill-served by the Cooperative continuing to provide service.

While the City is correct that there will be some cost and inconvenience associated with integrating the two utilities' systems when service rights are transferred, there is no evidence that the cost will be abnormally high or the inconvenience abnormally severe. The Legislature obviously knew that system integration involves some cost and inconvenience and nevertheless determined that the assigned utility should normally serve until compensation has been determined and paid.

Further, the City's claim that it is a virtual certainty that it will acquire service rights to the annexed areas and that this certainty entitles the City to interim service rights is misplaced. The City points to a series of Orders awarding interim service rights to the City of Rochester, but that situation was unique.²

First, the level of certainty that the City of Rochester would follow through on its municipal acquisitions was extraordinarily high. Not only did the City have a longstanding commitment to serving everyone within its city limits – not present in this case – but the City had a long history of following through on that commitment. It was not until the City had completed many acquisitions over the course of several years that the Commission began awarding interim service rights to the City of Rochester.

Further, the electric systems of the City of Rochester and the cooperative it was displacing were incompatible in ways that made integrating their facilities difficult and expensive.

In short, the factors that led the Commission to grant interim service rights to the City of Rochester are not present in this case. For all these reasons, the Commission will deny the City's petition for interim service rights to the annexed areas.

² See, for example, *In the Matter of a Petition by the City of Rochester to Provide Interim Service to 1993-94 Annexations*, Docket No. E-132,299/SA-94-442, ORDER GRANTING INTERIM SERVICE RIGHTS (July 15, 1994).

NOTICE AND ORDER FOR HEARING

I. Jurisdiction and Referral for Contested Case Proceedings

The Commission has jurisdiction over assigned service area disputes under Minn. Stat. §§ 216B.37-.44. The Commission has jurisdiction to determine compensation for municipal utility acquisitions of other utilities' service territories under Minn. Stat. § 216B.44.

The Commission finds that it cannot determine, on the basis of the record before it, the amount of compensation due Wright-Hennepin for service rights to the annexed areas at issue. That determination turns on specific facts that are best developed in formal evidentiary proceedings. The Commission will therefore refer the matter to the Office of Administrative Hearings for contested case proceedings.

II. Issues to be Addressed

Minn. Stat. § 216B.44 requires consideration of the following factors in determining compensation in municipal acquisition cases: the original cost of any property acquired by the municipality, depreciation on such property, loss of revenue by the displaced utility, expenses resulting from integration of facilities, and other appropriate factors.

The parties shall address the above issues in the course of contested case proceedings.

III. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Beverly Jones Heydinger. Her address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 341-7606.

B. Hearing Procedure

- *Controlling Statutes and Rules*

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 117 University Avenue, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.leg.state.mn.us.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

- *Right to Counsel and to Present Evidence*

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

- *Discovery and Informal Disposition*

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Stuart Mitchell, Public Utilities Rates Analyst, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 296-8662; or Cassandra O'Hern, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 282-5725.

- *Protecting Not-Public Data*

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

- *Accommodations for Disabilities; Interpreter Services*

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

- *Scheduling Issues*

The times, dates, and places of public and evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

- *Notice of Appearance*

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

- *Sanctions for Non-compliance*

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The current parties to this case are the Wright-Hennepin Cooperative Electric Association, the City of Buffalo, and the Minnesota Department of Commerce. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference, which may be conducted by telephone, will be scheduled by the Administrative Law Judge. The Office of Administrative Hearings will notify all parties of its time, date, and place.

Parties and persons intending to intervene in the matter should attend the conference, prepared to discuss time frames and scheduling. Other matters which may be discussed include the locations and dates of hearings, discovery procedures, settlement prospects, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

IV. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., may apply to this case. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

V. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. The Commission denies the City of Buffalo's petition for interim service rights.
2. The Commission hereby refers the issue of compensation for service rights to the annexed areas to the Office of Administrative Hearings for contested case proceedings, as set forth above.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

100 Washington Square, Suite 1700
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of the Application of the City of
Buffalo to Extend its Assigned Service Area
into the Area Presently Assigned to Wright-
Hennepin Cooperative Electric Association

MPUC Docket No. E-221, 148/SA-03-989

OAH Docket No.

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Beverly Jones Heydinger, Office of Administrative Hearings, Suite, 1700, 100 Washington Square,
Minneapolis, Minnesota 55401; (612) 341-7606

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: _____

DATE: _____